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Supreme Court, U.S.
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92-1897

IN THE
SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM 1993

MICRO-TIME MANAGEMENT SYSTEMS, INC. a Michigan corporation; OTIS KIRKLAND, individually and on behalf of all other creditors, *Petitioner,*

v.

ALLARD & FISH, P.C., a Michigan professional corporation; DAVID W. ALLARD, JR., DEBORAH L. FISH, jointly and severally; *Respondent;*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORAL ARGUMENT REQUESTED

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63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Err in Affirming the District Court's Decision in dismissing Petitioner, Micro-Time's lawsuit against Respondent, Allard & Fish, P.C., David W. Allard, Jr., and Deborah L. Fish, on the grounds of res judicata, when the Third Amended Plan of Reorganization, confirmed by Order of the Court dated May 4, 1989, specifically states that "All Cause of Action" which Petitioner may choose to institute "Shall Be Vested" with Petitioner?

2. Did the Court of Appeals Err in affirming the District Court's decision in dismissing Petitioner, Micro-Time's Case against Respondent, Allard & Fish, P.C. when this Cause of Action revested in Petitioner upon confirmation of the Chapter 11 Plan of Reorganization pursuant to 11 USC 1142(b)?

3. Did the Court of Appeals Err in affirming the District Court's decision when the District Court using the Third Amended Plan and Order Confirming the Plan promulgated, while Bohl was Trustee and Allard & Fish were attorneys, as a bar to subsequent action against Allard & Fish, P.C., et. al.?

4. Did the Court of Appeals Err in denying Petitioner, Micro-Time's Motion for Reconsideration?

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Micro-Time Management Systems, Incorporated, a Michigan corporation; Otis Kirkland, Individually and on behalf of all other creditors make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Bankruptcy Code 11, United States Code, Sections 1127(B), 1142(b), 1141(a), and 1141(b),as well as the Federal Rules of Civil Procedure, Sections 60b(3), 12(6)(b) and 56. These statutory provisions are set out verbatim in Appendix C.

TABLE OF AUTHORITIES

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the rehearing (Appendix A. infra, 1a-2a) is not reported. The opinion of the Court of Appeals on appeal (Appendix B, infra, 1b-21b) is not reported.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals (Appendix B, infra, at 21b) was entered on January 12, 1992. A timely petition for rehearing was denied on February 25, 1993 (Appendix A, infra, 2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1331.

STATEMENT OF THE CASE

On February 19, 1988, Micro-Time Management Systems, Inc., filed its petition under Chapter 11 of the Bankruptcy Code. In late April or early May, 1988, Arnold Schaefer or Schaefer and Weiner, P.C., Chapter 11 counsel for the Debtor, was in contact with John C. Bohl, Jr. Schaefer asked whether Bohl would be available to serve as Trustee. In mid-May, 1988, Schafer and Bohl again had contact about Bohl becoming the operating Trustee for the Debtor's estate. Bohl expressed and acknowledged his interest in the trusteeship. On May 20, 1988, during a hearing on the motion for appointment of the trustee, the parties stipulated to the court's appointment of Bohl as Trustee for the Debtor's Chapter 11 estate.

On May 24, 1988, a Certification of Appointment of Bohl and his Acceptance of Appointment as Trustee were filed. On May 25, 1988, Bohl filed his Declaration that he was a disinterested person. On June 2, 1988, Bohl was formerly appointed the Chapter 11 Trustee. Bohl never disclosed, in his affidavit of May 25, 1988, any of his interests with Comerica Bank. He swore he was a disinterested person.

Bohl has taken the position that he advised Schaefer, who, should have advised Micro-Time, of Bohl's Comerica relationship. Bohl has also taken the position that he himself immediately advised Micro-Time of his Comerica relationship. These conversations are denied. Bohl, however, did not immediately advise the court of his business dealings with Comerica. Although he swore in a subsequent affidavit that he told the US Trustee in June of 1988.

On June 29, 1988, upon written application, an order was entered appointing David W. Allard, Jr., as counsel for the Trustee. Bohl has taken the position that he never discussed the issue of the alleged conflict with David Allard or with Deborah Fish, who at that time was an associate attorney in David Allard's office working on the case, because he believed the issue had been laid to rest. Circumstances would dictate, however, that Bohl would have made such a disclosure to his own attorneys. The order authorizing appointment of David W. Allard, Jr., as counsel, which includes by reference Allard's application, states that Allard was to inquire into the Comerica unsecured claim on behalf of the estate.

In a letter to the Bankruptcy court dated October 6, 1988, Kirkland sought to bring Bohl's alleged conflict of interest to the Bankruptcy Court's attention because he was suspicious of dealings between the Trustee and Comerica Bank. In his letter, Kirkland referred the Court to Bohl's Comerica relationship, and questioned Bohl's loyalty to the Debtor's estate in light of that relationship. On October 11, 1988, in response to Kirkland's letter, the Court sent a letter to Kirkland and a separate letter to Marion Mack, the Assistant U.S. Trustee.

On October 11, 1988, at a hearing in the Debtor's case, the Court handed out copies of the Kirkland letter and the Court's response to all parties.[1] Allard & Fish, et al. has alleged this was their first knowledge of the Bohl-Comerica relationship, even though they were empowered by the Court to investigate any and all dealings with Comerica Bank and its unsecured claim.[2]

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[1]The Court apparently did nothing else about the claimed conflict at this time.

[2]However, Allard & Fish represented Bohl prior to their appointment at a Status Conference held June 6, 1988 at which Bohl claims he revealed

On February 1, 1989, with Bohl as Trustee and Allard & Fish, et al. as attorneys, Debtor filed its Third Amended Disclosure and Third Amended Plan of Reorganization ("Plan"). Third Amended Disclosure and Third Amended Plan App.). This Plan and accompanying disclosure does not provide for lawsuits against Bohl and Allard & Fish who were still administering the estate; but it does not reserve to Debtor any causes of action it may wish to pursue. The Disclosure was approved by Order on February 23, 1989. At a hearing held that date, Judge Rhodes ordered the Trustee to disclose his connection to Comerica in the form of an affidavit. Bohl filed his affidavit on March 6, 1989. This was his first response to the Kirkland letter. Thus, no action was taken to investigate Bohl's conflict until the Disclosure and Plan were filed and the Disclosure had been approved.

Bohl petitioned for fees on February 1, 1989. Objections were filed by attorney Stockler on behalf of the Debtor. A Memorandum of Law regarding Bohl's conflict of interest was filed March 31, 1989. On April 4, 1989 Bohl filed a brief in

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his Comerica relationship. (R. 167 - Application for fees - Allard & Fish, App. at).

support of his position. At a hearing held April 4, 1989, the question of Bohl's fees was taken under advisement.

On April 18, 1989 a hearing was held on Confirmation of the Chapter 11 plan and the voting was reported. The Third Amended Plan of Reorganization was confirmed on May 4, 1989.

On June 23, 1989, the Court issued its Memorandum, Opinion and Order which found "a potential, if not actual conflict of interest" which gave rise to "an appearance of impropriety", which should have been disclosed in Bohl's original Affidavit of Disinterest. Until that date, there was no judicial determination of Bohl's conflict of interest. Clarification was requested and this finding was not disturded.

Promptly, in August, 1989, the Debtor and Mr. Kirkland, now represented by Lawrence M. Stockler, filed two (2) actions against Bohl and his accounting firm based upon his alleged breach of fiduciary duty as Trustee and accountant by failing to disclose the alleged conflict of interest.. In July of 1990, a jury returned a verdict of 1.1 Million Dollars against Bohl based on damages arising from the Comerica Settlement and the sale of the Devonshire property. Until that time there was no judicial

determination of the damages arising from Bohl's previous and now determined conflict of interest.

On May 4, 1990, Allard & Fish, P.C. made its second application for fees. Debtor objected to the application. A hearing was held on August 14, 1990. Judge Rhodes ruled that Allard & Fish breached their fiduciary duties to the estate and disallowed a major portion of their fee petition. During the months of September 1990 and October 1990, post-judgment hearings were held on the Bohl jury verdict and to reopen the case for purposes of filing the instant suit against Allard & Fish, et al.. Judge Rhodes ruled the case was never closed. Allard & Fish appealed. Judge LaPlata remanded Allard & Fish discontinued this proceeding .

On January 8, 1991, the action against Allard & Fish et al. was filed. Allard & Fish, et al. brought a motion to dismiss under FRCP 12(6)b or in the alternative for summary judgment under FRCP 56. Responses were filed by all interested parties. Predicted on a stipulation for withdrawal of reference, the action was withdrawn to the District Court. On September 30, 1991, the Honorable George LaPlata issued an Opinion and Order dismissing the lawsuit against Allard & Fish, P.C. The basis of

Judge LaPlata's ruling was that the May 4, 1989 Order confirming the Plan of Reorganization barred the action under the doctrine of res judicata. From this Order Micro-Time appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's decision on January 12, 1993. A timely petition for rehearing was denied on February 25, 1993. From this Order Petitioner appeals.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION IN DISMISSING PETITIONER, MICRO-TIME'S LAWSUIT AGAINST RESPONDENT, ALLARD & FISH, P.C., DAVID W. ALLARD, JR., AND DEBORAH L. FISH, ON THE GROUNDS OF RES JUDICATA, WHEN THE THIRD AMENDED PLAN OF REORGANIZATION, CONFIRMED BY ORDER OR THE COURT DATED MAY 4, 1989, SPECIFICALLY STATES THAT "ALL CAUSES OF ACTION" WHICH PETITIONER MAY CHOOSE TO INSTITUTE "SHALL BE VESTED" WITH PETITIONER.

In its Order of September 30, 1991, the District court held that the Order entered by Judge Rhodes on May 4, 1989, confirming the plan of reorganization was a final Order in the case. The District Court gave the Order res judicata effect, and held that is barred Micro-time's case against Allard & Fish, P.C., et al. The District court, however, never discussed the plan of reorganization, filed before investigation of the conflict and while Allard & Fish, et al. were still representing the trustee, which was confirmed by the Order of May 4, 1989. The plan of reorganization, on page 17, contains the following language:

> "All causes of action which the debtor may choose to institute shall be vested with the debtor."

The Order confirming the plan does not modify this language in any way.

The Bankruptcy court confirmed the plan based on the vote of the creditors and after making specific findings that the plan was in the best interest of the creditors, and after having found that the appropriate number of creditors had voted in favor of the plan.

Further review of the plan and of the Bankruptcy Court's Order reveals that the one class of creditors whose interests were impaired by the plan were those in Class X. Class X creditors were due to received a distribution of five percent (5%) per year on their claims with the proviso that if the debtor received operating profits greater than the forecasted operating profits exhibited in the accompanying forecasted financial statements, the unsecured creditors in Class X would received additional distributions. Any proceeds of the Allard & Fish lawsuit would necessarily cause Micro-time to achieve to achieve higher operating profits, and thus would benefit the one class of creditors whose claims were impaired by the plan of reorganization. The creditors committee supported Micro-Time's efforts to bring this cause of action against Allard &

Fish, P.C., with attorney Stockler attempting to insinuate himself as attorney for this Class.

The only claim of Allard & Fish, P.C., et al. was its claim for attorney's fees, which claim was substantially reduced by Order of the Bankruptcy Court upon a finding that they failed in their duties as attorney for the trustee by failing to advise the trustee of the conflict of interest when it was quite apparent to them. The Bankruptcy Court further found that the trustee was relatively inexperienced in Chapter 11 cases but that Allard & Fish, P.C. was experienced. Judge Rhodes placed a share of the blame for the substantial damages to the estate on Allard & Fish, P.C., et al. This issue was before Judge Rhodes on Allard & Fish P.C.'s first application for fees on May 4, 1989, when the plan was confirmed.

Allard & Fish, P.C., in their Motion, did not discuss the Plan of Reorganization, but instead chose to discuss the Third Amended Disclosure Statement dated February 1, 1989 (when Bohl was still trustee). Allard & Fish, P.c. claimed that since Micro-Time did not disclose the potential cause of action against its own trustee and the trustee's attorney in the Third Amended

Disclosure Statement, the Order confirming the plan serves as a bar to a suit against the trustee's attorney.

This Disclosure and Plan was filed before the February 23, 1989 hearing where Bohl was ordered to file the affidavit regarding conflict of interest; before March 6, 1989, the date that Bohl filed his affidavit regarding conflict of interest. The Bankruptcy Court confirmed the Plan of Reorganization on May 4, 1989 when it had the matter of accounting and trustee fee applications, and the objections thereto, under advisement.

It was evidence to all parties involved in this litigation, including Allard & Fish, P.C. that serious allegations had been raised regarding Bohl's conflict of interest at a time when Allard & Fish, P.C., et al. were representing him. The voluminous record does not disclose any objections to the language of the Third Amended Plan of Reorganization reserving to Micro-Time any causes of action it may choose to initiate.

A court speaks through its Orders. The Order in the present case is clear. The Third Amended Plan of Reorganization was confirmed after negotiations and with certain modifications, which did not affect the language contained on page 17 of the plan. Under the plan of reorganization, Micro-

Time was absolutely free to bring this cause of action, the results of which would benefit the creditors. The record does not disclose anyone's intent to foreclose further litigation on the conflict issue. It was still before the Court and still very much "alive".

The doctrine of res judicata is a doctrine of repose. It serves to prevent re litigation of issues which have previously been decided. As this Court stated in Consolidated TV Cable Service v City of Frankfurt, 858 F2d 354 (6th Cir. 1988), under the doctrine of re judicata, a final judgment on the merits bars further claims by the parties on the same cause of action including "issues which could have been but were not litigated in the prior proceedings". See, Vinson v Campbell County Fiscal Court, 820 F2d 194 (6th Cir. 1987). However, the doctrine cannot apply to bar subsequent actions when the final judgment specifically bestows on one of the parties the right to pursue subsequent actions. Quite frankly, the Bankruptcy Court's Order confirming the plan was without prejudice to Micro-Time's ability to bring this lawsuit. The issue of the Trustee's and the lawyers' conflict was still being litigated when the May 4, 1989 Order was entered, and continued to be litigated in the

Bankruptcy court until August 14, 1990, when Judge Rhodes ruled that Allard & Fish et al. had a conflict of interest.

In addition to the express reservation of the Order, one element necessary to constitute res judicata did not exist at the time the Plan was approved. The action against Allard & Fish could not have been brought before the Third Amended Plan was accepted. The Debtor himself raised the conflict issue to the Bankruptcy Judge on October 8, 1988. Nothing was done. Bohl remained as Trustee, with the power to bring suit on behalf of the estate until the Plan was confirmed on May 4 1989. Bohl did not sue himself or his attorneys. The Third Amended Disclosure Statement was filed February 1, 1989, and The Disclosure was approved on February 23, 1989, the date the Court ordered on May 4, 1989. Bohl's and Allard & Fish, et al.'s fee petitions and objections thereto were before the Court and under advisement on May 4, 1989. It was not until June 23, 1989, that there was an adjudication that Bohl was unsuitable as a trustee.

Micro-Time could not bring suit until it was restored to possession of its assets on May 4, 1989. Micro-time could not have brought the action before the Order was entered. The

action concerns the very things the Debtor tried to bring to the attention of the Court, when the trustee was in control of its assets. It was legally impossible for Micro-Time to bring this action before May 4, 1989, and therefore the doctrine of res judicata cannot apply to the May 4, 1989 Order to bar the instant claim. Consolidated TV Cable Service v City of Frankfurt, 858 F2d 354 (6th Cir. 1988).

II. THE COURT OF APPEAL ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION IN DISMISSING PETITIONER, MICRO-TIME'S CASE AGAINST RESPONDENT, ALLARD & FISH, P.C. FOR THE REASON THAT THE CAUSE OF ACTION REVESTED IN PETITIONER UPON CONFIRMATION OF THE PLAN AND THE PRINCIPLES OF RES JUDICATA DO NOT APPLY.

Once a plan of reorganization is approved, Section 1142(b), of the Bankruptcy Code 11 USC 1142(b) provides that:

> "Except as otherwise provided in the plan or the Order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."

A cause of action against a third party is certainly a property or interest of the bankruptcy estate. Indeed, contingent

lawsuits are dealt with in the plan of reorganization filed in this case and are specifically reserved to the Debtor. Upon confirmation of the plan on May 4, 1989, the cause of action against Allard & Fish, P.C., et al. accrued to Micro-Time. Indeed Micro-Time proceeded to Jury Trial and Judgment against Bohl.

Allard & Fish, P.C. et al. are in a rather poor position to complain that the plan somehow bars Micro-Time's suit against them. The suit will directly benefit the creditors of Class X. Certainly, the thought that Micro-Time might press litigation against third parties and therefore generate more income with which to make distributions to them may have been a motivating factor in some of the Class X votes to confirm the plan. The motion of Allard & fish, P.C., et al. is an attempt by it not only to escape liability to Micro-Time but to evade responsibility to the class of creditors for whose benefit the Chapter 11 proceedings were instituted.

In Goodman v The Phillip R. Curtis Enterprises, Inc. 809 F2d 228 (4th Cir. 1987) Goodman had been seriously injured in an airplane accident. His creditor brought Chapter 7 proceedings against him. Those proceedings were subsequently converted to

Chapter 11 proceedings. Prior to expiration of the statute of limitations on the airplane case Goodman prevailed on his bankruptcy attorney to file suit against the alleged tortfeasors. A petition was made for authority to enter into an attorney-client relationship for this purpose and for payment of expenses of the lawsuit. This lawsuit was not mentioned or included in the disclosure statement, or in the schedule of assets filed prior to confirmation or the plan of reorganization.

After confirmation of the plan, the Defendants in the airplane litigation made a settlement offer. Goodman did not want to accept the offer. However, the bankruptcy attorney petitioned the Bankruptcy Court for authority to settle the tort litigation and to pay attorney fees and costs. the Bankruptcy Court ordered the tort litigation settled and the proceeds distributed. While an appeal from that Order was pending, the tort-claim Defendants paid the settlement and the Court ordered a release signed.

The Court of Appeals held that the Order of the Bankruptcy Court must be vacated. The Court held that assets which were not dealt with under the plan vested in the Debtor upon confirmation. However, the Court did state that a plan,

once confirmed, may be modified under 11 USC 1127(b). Due to the fact that the settlement had been paid and the State Court tort claim had been dismissed based on the "facial regularity" of the Federal Court Order, the case would be remanded to ascertain whether the plan should be modified to include the tort claim.

In the instant case, consistent with this procedure, a motion was made by the creditors to "reopen the case" to include the case against Allard & Fish, P.C. Micro-Time complied with all procedural prerequisites to proceed against Allard & Fish, P.C. Indeed at the time of hearing the Bankruptcy Court held that the case was never closed (Transcript 12/21/90 App.) Micro-Time submits that the creditors did more than was necessary due to the fact that the cause of action certainly belonged to it under 11 USC 1142(b) and it was free to pursue the cause of action pursuant to the terms of the confirmed plan.

In the case of In RE: Chattanooga Wholesale Antiques, Inc. 930 F2d 458 (6th Cir. 1991), the issue was whether certain payments made to a bank should be returned to the bankruptcy estate. Originally the case was a Chapter 11 proceeding, but

subsequently it was converted to a Chapter 7 proceeding. Three classes of payment were considered:

A. Pre-Petition payments occurring within ninety (90) days of filing;

B. Post-petition (Chapter 11) but pre-confirmation payments, and

C. Post-confirmation (Chapter 11) payments occurring before institution of Chapter 7 proceedings.

The Court held that the pre-petition payments and the post-petition, pre-confirmation payments were recoverable by the trustee. However, as to the post-confirmation proceedings, the Court invoked Section 1141(b), and held that the property of the estate had reverted to the Chapter 11 Debtor. Therefore, the payments were not recoverable by the trustee. Further, the confirmed plan considered the debt of the bank as a secured debt when it in fact was unsecured. The Court did hold that:

> "Mischaracterization of the bank's debt and the plan should have been raised at the confirmation hearing."

The payments were regularly ordered payments pursuant to the Chapter 11 plan and hence, not recoverable as assets of the estate.

Several cases which have applied the doctrine of res judicata to bar post confirmation claims to demonstrate that the doctrine is not properly applied to the case at bar.

In Sure-Snap Corp. v State Street Bank and Trust Co., 948 F2d 869 (2nd Cir. 1991) and In the Matter of Howe, 913 F2d 1138 (5th Cir. 1990) the debtor attempted to file post-petition lender liability claims against large creditors whose debts were dealt with extensively in the pre-confirmation bankruptcy proceedings. The claims of the creditors had been allowed and were part of the respective plans. Both Courts held that the respective plans had res judicata effect and barred the subsequent suits. In both cases there was identity of parties, and the issue of lender liability was or should have been brought in the confirmation proceeding at which time the amount of the debt to the creditor was determined. The Sure-Snap and Howe cases are readily distinguishable from the case at bar. Allard & Fish, et al. was not a party to the Chapter 11 proceedings involving Micro-Time. Attorneys are not parties to litigation. An attorney's malpractice in the course of litigation has never been held to be part of the "facts and circumstances" in the underlying litigation. Therefore there is no identity of issues or parts, a

necessary prerequisite before res judicata can be applied. Allard & Fish, et al. was not a pre-petition creditor, as were the defendants in Sure-Snap and Howe, supra. Allard & Fish's fee claim for fees incurred on behalf of the estate was not adjudicated by the Bankruptcy Court until August 14, 1990, months after the plan was confirmed. The claim against Allard & Fish, et al would not vitiate the Bankruptcy proceedings since the proceeds would benefit the only impaired creditors. This Court should follow Goodman, supra and reverse the Order of the District Court.

III. THE COURT OF APPEAL ERRED IN AFFIRMING THE DISTRICT COURT'S DECISION WHEN THE DISTRICT COURT USING THE THIRD AMENDED PLAN AND ORDER CONFIRMING THE PLAN PROMULGATED WHILE BOHL WAS TRUSTEE AND ALLARD & FISH WERE ATTORNEYS BARRED SUBSEQUENT ACTION AGAINST ALLARD & FISH, P.C., ET AL.

In its bench opinion of August 14, 1990, Bankruptcy Judge Rhodes found that Allard & Fish, et al. owed a "substantial obligation" after Kirkland's letter of October 6, 1988, to at least "understand [sic] an investigation of the factual basis of the allegation, and then to investigate the legal consequences of the facts that it determined in its investigation". The Court found the failure to investigate and "failure to

disclose" as substantial". The Court also found that Allard & Fish, et al bears at least "some of the responsibility" for the damages to the estate. Thus, the Court reduced Allard & Fish's fee application from $63,813.25 to $25,000. Allard & Fish initially appealed, but subsequently withdrew the appeal.

Bohl was Trustee, and Allard & Fish, et al were attorneys for the Trustee when the Third Amended Disclosure Statement and Plan for Reorganization were prepared and filed as set forth in the Order confirming the Plan of May 4, 1990. Bohl testified at the confirmation hearing. Both Bohl and Allard & Fish bore a fiduciary responsibility to the estate. If there was a failure to disclose a potential lawsuit, this was yet another breach of duty on the part of Bohl and Allard & Fish. A party cannot interpose his or her own breach of duty as a defense to a lawsuit. Such a contention is absurd.

On May 4, 1990, when the Third Amended Plan was approved, Bohl and Allard & Fish had fee petitions before the Bankruptcy Court, which fee petitions, by implication, were a verification that these fiduciaries felt they were guilty of no wrongdoing. One would not expect them to insist on including a lawsuit against themselves on the disclosure statement.

A party cannot benefit by its own misconduct. For example, FRCP 60(b)3 provides relief from a judgment or order upon a showing of "fraud...misrepresentation, or misconduct of an adverse party". Thus, a party has been given relief from an adverse judgment where the adverse party concealed an unfavorable cost estimate, Square Const. Co. v Washington Metro Area Transit Auth. 657 F2d 68 (4th Cir. 1981), where the other side concealed documents, Rozier v Ford Motor Company. 573 F2d 1332 (5th Cir. 1978) and where a party misrepresented insurance coverage, Conerly v Flower. 410 F2d 941 (8th Cir. 1969).

If a party can be given relief from a judgment, it can be given relief from the res judicata effect of a judgment, given the misconduct of the adverse party. Here Allard & Fish, et al were guilty of a judicially determined breach of duty - - certainly misconduct under FRCP 60(b)(3). If nothing else, this precludes Allard & Fish from interposing the Judgment as a bar to Micro-Time's action.

Indeed, if res judicata effect should be given to the various orders made by the Bankruptcy Court, judgment of liability should be entered against Allard & Fish, et al. The Court's

finding of August 14, 1990 as set forth above, became final when Allard & Fish, et al. discontinued its quest for the remainder of the claimed attorney fee. (Discontinuance of Appeal App.). Unlike Micro-Time's claim against Allard & Fish, et al., this was an issue that was actually litigated. Under Consolidate TV Cable v City of Frankfort, 857 F2d 354 (6th Circuit 1988), the finding of Bankruptcy Judge Rhodes is final and binding on Allard & Fish. Allard & Fish, et al's liability has been established. The only issue remaining is damages.

IV. THE COURT OF APPEALS ERRED IN DENYING PETITIONER'S MOTION FOR RE-CONSIDERATION.

The decision of the Court of Appeal reflected palpable error by which the Court of Appeal was misled, necessitating a Motion for Reconsideration.

The Court of Appeal's opinion set forth specific instances in which Kirkland, on behalf of MICRO-TIME, objected to the plan, and to the conflict involving Bohl. There is nothing in the record below, however, which supports the Court of Appeal's finding that the Unsecured Creditors received notice of the Kirkland letter objecting to the conflict. That is because the Bankruptcy Court forwarded the letter to the United States

Trustee and to no one else. Therefore, the Unsecured Creditors had no opportunity to object to the conflict.

The Court of Appeal further found as fact that Appellees Allard & Fish did not know about the conflict between Bohl and the largest creditor of the estate, Comerica, until well after they were appointed. However, in order to make this finding, the Court of Appeal rejected Appellants' reference to the Bohl affidavit, which reflected that Appellees knew as of June 2, 1988, prior to their formal appointment. Specifically, Bohl stated he informed the U.S. Trustee of his conflict in the presence of Allard & Fish on June 2. Indeed, Appellees billed six hours for this conference, prior to the formal appointment.

The record below reflects that Kirkland objected to the conflict and sent information about his objection and the conflict to the Bankruptcy Court, the U.S. Trustee (twice), and to the Federal Bureau of Investigation. Kirkland only agreed to the settlement and to the plan when he was threatened that otherwise he would be converted to Chapter 7. Therefore, the confirmation was not volitional, but was coerced and under duress. This is supported by the fact that nothing changed between Kirkland's position which was further weakened when

the Bankruptcy Court, which heard the issue of Bohl's conflict prior to the confirmation, took the questioned under advisement, and did not issue a decision until after the confirmation.

This Court of Appeal therefore further erred by finding that the only valid objection Kirkland could make to the plan was to refuse to accept it. The Court of Appeal, however, failed to recognize that the other steps he took were not effective, and that his approval resulted only from duress. His acquiescence, further, occurred only after the Bankruptcy Court failed to notify the Unsecured Creditors, and neglected to rule on the Bohl conflict until after the plan was confirmed, when the question of Bohl's conflict was essential to a fair determination of whether the plan should be confirmed. The failure of the U.S. Trustee to do anything, in a situation in which it was later determined that Kirkland's objections and concerns were well-founded, that Bohl indeed had a conflict, renders the confirmation involuntary as well.

The situation at bar is one in which the only substantive defense proffered by Respondent is that they did not know until later that there was a conflict. They do not deny that they knew there was a conflict at least as of the time that Kirkland objected,

and the Bankruptcy Court took the question under advisement. Yet they, and the Bankruptcy Court, continued to process an improper plan.

The Court of Appeal determined that Respondent were fiduciaries and were responsible to the creditors as well as to the shareholder. The failure to include an action against themselves is a violation of this fiduciary duty. The Court of Appeal's decision additionally places an untenable burden on Petitioner, a layperson, which does not reflect the breach of fiduciary responsibility.

This Court of Appeal found that the motion to reopen the estate to include a cause of action against Respondent was denied. This is not true, and reflects error by the Court of Appeal. The motion was not denied. The Bankruptcy Court found that the estate was not closed and that the motion was not necessary.

This Court of Appeal also held that the award of reduced attorney fees to Appellees somehow vindicates them. However, the Bankruptcy Court reduced the fee because of a specific finding that their conduct was inadequate in view of the conflict.

Until the Bankruptcy Court ruled that Bohl had a conflict, Petitioner had no way to know they had a cause of action. If they had insisted on inserting the claim in the plan, both Bohl and Respondent would have refused to do so, because the Bankruptcy Court had not yet ruled. The decision of this Court of Appeal did not consider the effect of the Bankruptcy Court's refusal to rule until after confirmation, and the concomitant requirement under Fed. R. Civ. P. 11, that there be a factual basis for inclusion of a cause of action.

The purpose of bankruptcy is to permit the debtor to obtain a fresh start. The record reflects that had Kirkland not acquiesced, his desire for this fresh start would have been rejected, and his request for Chapter 11 would have been converted to Chapter 7. Therefore, those parties involved in the conflict were also responsible for attempting to defeat the very purpose of the bankruptcy process.

The decision of the Court of Appeal rejected Petitioner's public policy argument, based on the above misconstrual of facts. The Court of Appeals found attractive the argument that the debtor should not be foreclosed from a cause of action against those attorneys responsible for including an action against

themselves in the plan, because of those attorneys' failure to include that action in the plan. However, the Court of Appeal held that the facts at bar did not support such an argument.

The Court of Appeal, however, did not recognize that under this constraint, the debtor would never have a cause of action, because the attorneys would never include an action against themselves in the plan. Further, is not the failure to include such an action in the plan itself evidence of legal malpractice and breach of fiduciary duty?

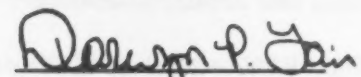
Therefore, where, as in the case at bar, the debtor strongly makes a record prior to confirmation that there is a conflict, and asks the Bankruptcy Court to rule on the conflict, and there is a finding of conflict, but only post-confirmation, that res judicata should not foreclose a cause of action under these limited circumstances.

CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari, and reverse the Court of Appeal's decision affirming the District Court's judgment that Petitioner's claims are barred by the doctrine of res judicata.

Respectfully submitted,

SEGUE & FAIR



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Appendix A

No. 91-2261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.,

Debtor

MICRO-TIME MANAGEMENT SYSTEMS, INC., A MICHIGAN CORPORATION; OTIS KIRKLAND, INDIVIDUALLY AND ON BEHALF OF ALL OTHER CREDITORS,

Plaintiffs-Appellants,

v.

ALLARD & FISH, P.C., A MICHIGAN PROFESSIONAL CORPORATION; ET AL.,

Defendants-Appellees,

ALLARD & FISH, P.C., ET AL.,

Third-Party Plaintiffs,

LAWRENCE J. STOCKLER & ASSOCIATES, P.C., ETC., ET AL.,

Third-Party Defendants.

BEFORE: JONES and SILER, Circuit Judges; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: MICRO-TIME MANAGEMENT SYSTEMS, INC.

Debtor.

MICRO-TIME MANAGEMENT SYSTEMS, INC.; OTIS KIRKLAND, Individually and on behalf of all other Creditors, (91-2261),

Plaintiffs-Appellants,

and

CREDITORS OF MICRO-TIME MANAGEMENT SYSTEMS, INC. (91-2260),

Plaintiffs-Appellants,

v.

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH, Jointly and Severally,

Defendants-Appellees.

ALLARD & FISH, P.C.; DAVID W. ALLARD, JR.; and DEBORAH L. FISH,

Third-Party Plaintiffs,

v. :
:
LAWRENCE J. STOCKLER AND :
ASSOCIATES, P.C.; LAWRENCE J. :
STOCKLER, Jointly and Severally; :
SCHAFER & WEINER, P.C.; ARNOLD S. :
SCHAFER, Individually, Jointly :
and Severally, :
:
Third-Party Defendants. :

BEFORE: **JONES** and **SILER**, Circuit Judges; and **PECK**, Senior Circuit Judge.

PER CURIAM. Micro-Time Management Systems, Inc. ("MTMS", "Debtor"), Otis Kirkland, individually and on behalf of all creditors, and "Creditors of MTMS" (hereinafter collectively referred to as "Plaintiffs") appeal an order dismissing, under the doctrine of res judicata, their complaint alleging that Allard & Fish, P.C., David Allard, Jr., and Deborah Fish (hereinafter collectively referred to as "Allard & Fish"), counsel for MTMS' trustee in bankruptcy, committed malfeasance by failing to investigate a potential conflict of interest on the part of the trustee.[1] For the reasons stated herein, we affirm.

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[1] In 1991, Lawrence Stockler, as counsel for MTMS, filed an action (presently No. 91-2261) in bankruptcy court on behalf of MTMS and Kirkland, acting in his individual capacity and on behalf of all other

creditors who would seek to participate in this action, against Allard & Fish. The case was referred to the district court where Allard & Fish moved to dismiss. Allard & Fish also filed a third-party complaint against Stockler, thus making him a party to the proceedings. Stockler then moved to withdraw as counsel for MTMS and Kirkland. Stockler, thus making him a party to the proceedings. Stockler then moved to withdraw as counsel for MTMS and Kirkland. Stockler did not specify at that time whether he was moving to withdraw as counsel for Kirkland in Kirkland's individual or representative capacity, however. the District court granted Stockler's motion to withdraw; however, it did not limit the withdrawal of Stockler to just MTMS and Kirkland in his individual capacity. After MTMS and Kirkland obtained substitute counsel who purported to represent MTMS and Kirkland, in his individual and representative capacities, the district court dismissed the case on the basis of res judicata.

MTMS and Kirkland have appealed the district court's decision. Stockler, believing that he withdrew from representing Kirkland in his individual capacity only, filed an appeal (presently No. 91-2260) on behalf to he other creditors. We find that when Stockler withdrew from the representation of Kirkland, he did not limit his withdrawal to just the representation of Kirkland in his individual

I.

On February 19, 1988, MTMS filed its petition in bankruptcy court pursuant to Chapter 11 of the Bankruptcy Code. Motions for the appointment of a trustee for MTMS were filed by Comerica Bank ("Comerica"), a major secured creditor of MTMS< and by Roaring Springs Blank Book Company ("Roaring Springs"), the chair of the Unsecured Creditors Committee. In late April or early May, 1988 Arnold S. Schafer of Schafer & Weiner, P.C., bankruptcy counsel for MTMS, contacted John C. Bohl, Jr., and informed him that a trustee was being sought and inquired whether Bohl would be able to serve as trustee.

In May 1988, Schafer again contacted Bohl. Bohl acknowledged his interest but advised Schafer that he, as a

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capacity. In the absence of that limitation, Stockler's withdrawal from the representation of Kirkland included withdrawal from both Kirkland's individual and representative capacities. Therefore, we find that Stockler is no longer representing any Plaintiff or Appellant in the case. We have decided to consolidate Stockler's "appeal" in No. 91-2260 with No. 91-2261.

general partner of RGB Associates, had provided consulting services to Comerica on a totally unrelated foreclosure matter which was winding down. Schafer told Bohl that the relationship did not represent a conflict of interest.

On May 20, 1988, Bohl met Kirkland, the owner of MTMS, and representatives of Comerica and Roaring Springs. As a result of this meeting, the parties stipulated to the court's appointment of Bohl as trustee.

On May 24, 1988, prior to his retention of counsel, Bohl filed an "Affidavit of Disinterested Person" which did not set out any contemporaneous relationships with Comerica Bank. On that same date, Bohl was appointed trustee.

On June 29, 1988, an order was entered appointing David Allard, Jr., as counsel for the trustee. Bohl states that he did not discuss the issue of the alleged conflict with Comerica with Allard or with Deborah Fish, who at that time was an associate attorney in Allard's office working on the case. The Plaintiffs contend that is not true because the order authorizing the appointment of Allard as counsel states that Allard was to inquire into a Comerica claim on behalf of the estate.

In a letter to the bankruptcy court dated October 6, 1988, Kirkland sought to bring Bohl's alleged conflict of interest to the bankruptcy court's attention because Kirkland was suspicious of dealings between the Bohl and Comerica. In his letter, Kirkland referred the court to Bohl's relationship with Comerica, and questioned Bohl's loyalty to the Debtor's estate in light of that relationship.

On October 11, 1988, the court sent a letter to Kirkland and a separate letter to Marion Mack, the Assistant U.S. Trustee. In the letter, the judge instructed that the matter should be handled by the U.S. Trustee because he is responsible for overseeing trustees. Also on October 11, 1988, at a hearing in the Debtor's case, the court handed out copies of the Kirkland letter and the court's response to all parties.

Meanwhile, with MTMS', Kirkland's, Schafer's, the bankruptcy court's, the U.S. Trustee's, and the Unsecured Creditors Committee's knowledge of the alleged conflict, the bankruptcy proceedings continued to the apparent satisfaction of all interested parties. For example, on October 18, 1988, Comerica and MTMS reached a settlement which Kirkland approved. Schafer approved this settlement agreement. This

agreement was then noticed for hearing before the Court and no objections were filed by any interested party. On November 10, 1988, an order approving the settlement with Comerica was entered.

On February 1, 1989, with Bohl as trustee and Allard & Fish as its attorneys, MTMS filed its Third Amended Disclosure and Third Amended Plan of Reorganization ("plan"). There was no explicit mention of potential causes of action relating to Bohl's relationship with Comerica or any alleged errors of omissions of Allard & Fish. At a hearing held on that date, the bankruptcy court ordered Bohl to disclose his connection to Comerica in the form of an affidavit, which he did on March 6, 1989.

Bohl also petitioned for fees on February 1, 1989. Objections were filed by attorney Lawrence Stockler on behalf of MTMS. At a hearing held on April 4, 1988, the question of Bohl's fees was taken under advisement.

On April 18, 1989, a hearing was held on confirmation of the plan and the voting was reported. The plan was confirmed by a confirmation order on May 4, 1989.

On June 23, 1989, the bankruptcy court issued a memorandum opinion and order which denied Bohl's fee applications in their entirety, vacated the orders appointing Bohl as trustee, and disqualified Bohl and his accounting firm from any further involvement as trustee or accountant. The Court found a potential, if not actual conflict of interest, which gave rise to an appearance of impropriety, and which should have been disclosed in Bohl's original "Affidavit of Disinterested Person."

In late August 1989, MTMS and Kirkland, represented by Stockler, filed two causes of action against Bohl seeking damages resulting from Bohl's alleged breach of fiduciary duty as trustee and accountant in the alleged failure to disclose the Comerica relationship. In July 1990, a jury returned a verdict against Bohl based on damages arising from the Comerica settlement and the sale of the Devonshire property (a property disposed of in the plan). The jury verdict against Bohl was vacated by the bankruptcy court in its July 26, 1991 order because of newly discovered evidence, pursuant to Rule 60 of the Federal Rules of Civil Procedure.

After the filing of the MTMS claim against Bohl, but before the trial on the matter, MTMS filed a motion to modify the plan on October 16, 1989. The court entered its order modifying the plan on December 19, 1989.

In May 1990, Allard & Fish filed its second and final application for attorney fees. This application was objected to by Stockler, Kirkland, and MTMS. On August 14, 1990, after the jury verdict in the Bohl case, the court considered the Allard & Fish fee application. The Court awarded Allard & Fish $25,000.00 out of a requested $66,381.19.

On November 14, 1990, Stockler filed a motion to reopen the case. The motion requested that the Unsecured Creditors Committee be allowed to pursue causes of action against Allard & Fish for alleged legal malpractice based on its representation of Bohl as the MTMS trustee. That motion was denied by the bankruptcy court.

On January 8, 1991, this action against Allard & Fish was filed by MTMS and Kirkland, in his individual capacity and on behalf of all other creditors. Stockler was counsel for MTMS and Kirkland. Among numerous other allegations, the complaint alleged legal malpractice by Allard & Fish based on alleged

errors and omissions in its representation of Bohl. The action was removed to the district court. Pursuant to the Federal Rules of Civil Procedure, Allard & Fish moved to dismiss the case under Rule 12(b)(6) or for summary judgment under Rule 56. On September 30, 1991, the district court dismissed the lawsuit against Allard & Fish. The basis of the district court's ruling was that the May 4, 1989 order confirming the plan barred the present action under the doctrine of res judicata. From this order, the Plaintiffs appeal.

II.

The Plaintiffs argue that their present action is not barred by the principles of res judicata. They argue that the alleged cause of action against Allard & Fish could not have been brought prior to the entry of the confirmation order because they were not aware of the extent or depth of Bohl's conflict of interest until the jury returned a verdict in the Bohl litigation and therein set forth a specific dollar amount of damages.

Allard & Fish contend that Plaintiffs' potential alleged cause of action against Allard & Fish was in place prior to the date of the entry of the confirmation order. Because the claims

were not asserted, Allard & Fish contends that the claims are barred by the principle of res judicata.

A district court's dismissal of a case on res judicata grounds in reviewed de novo by this court. Sanders Confectionery Products, Inc. v. Heller Fin., Inc., 973 F2d 473, 480 (6th Cir.) citing Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 918 F2d 658, 660 (6th Cir. 1990), petition for cert. filed, 61 U.S.L.W. 3403 (U.S. Nov. 16, 1992) (No. 92-853).

The doctrine of res judicata, also called claim preclusion, means a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (181). Res judicata has four elements: 1) a final decision was rendered on the merits in the first action by a court of competent jurisdiction; 2) the second action involved the same parties, or their privis, as the first; 3) the second action raises an issue actually litigated or which should have been litigated in the first action; and 4) there is an identity of the causes of action. Sanders Confectionery, 973 F2d at 480.

A.

In the bankruptcy context, an order confirming a plan or reorganization constitutes a judgment and a final adjudication on the merits of a bankruptcy proceedings. Id. (citing Stoll v. Gottlieb, 305 U.S. 165, 169-171 (1938); In re Chattanooga Wholesale Antiques, Inc., 930 F2d 458, 463 (6th Cir. 1991); 11 U.S.C. §1141(a) 9188) (outlining preclusive effect of confirmed plan). An order confirming a plan of reorganization bars litigation of the claims raised in the bankruptcy proceedings and also bars any claims that could have been raised in the bankruptcy proceedings or the confirmation proceedings not expressly reserved in the plan of reorganization or the order confirming the plan of reorganization. See id.; see also Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F2d 869, 872-73 (2d Cir. 1991).

In this case, the bankruptcy judge entered the order confirming the plan after giving full notice and an opportunity to be heard to all interested parties. This order was approved by the Plaintiffs, and was not appealed. Furthermore, in a subsequent motion to modify the plan, the Plaintiffs again did not

seek to preserve any claim against Allard & Fish. The plan and its later modification did not reserve any right of a claim against Allard & Fish even though the Plaintiffs knew that there was a cause of action against Allard & Fish before the plan was confirmed and before they requested a modification of the plan. Therefore, the order confirming the plan acts as a final judgment.

Courts have held in the context of bankruptcy matters that not only formally named parties, but all participants in the bankruptcy proceedings are barred by res judicata from asserting matters they could have raised in the bankruptcy proceedings. See Met-L-Wood Corp. v. Pipin, 861 F2d 1012, 1016 (7th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).

In particular, the res judicata effect of the order confirming the plan bars claims by creditors that could have been brought within the context of the confirmation proceedings. Sanders Confectionery, 973 F2d at 480-81; In re Justice Oakes II, Ltd., 898 F2d 1544, 1551 (11th Cir.), cert. denied, 111 S. Ct. 387 (1990). In addition, a trustee is considered a party to a confirmation proceeding. Sanders Confectionery, 973 F2d at 481.

In this case, MTMS, Kirkland, any creditors of MTMS, and Allard & Fish would all be considered participants in the bankruptcy proceedings. MTMS, as the Debtor, was a party to the bankruptcy proceeding. Kirkland, as owner of MTMS and as a creditor, was a party to the proceeding. Id. Similarly, any other "creditors" are parties to the proceeding. Id. Allard & Fish would also be party to the proceeding or, at least, privy to parties of the proceeding. Cf. id. (trustee is party to a proceeding); In re El San Juan Hotel Corp., 841 F2d 6, 10 (1st Cir. 1988) (Under doctrine of nonmutual claim preclusion, an attorney for a former trustee of Chapter 11 estate could use a prior action brought against the former trustee for willful beach of duties to estate as a defense to a later suit against that attorney even though attorney was not party to initial suit. Non mutual claim preclusion deals with whether a party not involved in the earlier action may deflect a second lawsuit because he should have been, but was not, included in the earlier suit. What makes this nonmutual is that a plaintiff cannot rely on the earlier action as an estoppel against the attorney.); see also Met-L-Wood, 861 F2d at 1018 (the trustees' fraud claim against a collection of

defendants, including the debtor's law firm was barred by the confirmation order).

C.

The third element of res judicata prohibits parties from bringing claims they have already brought or should have brought. The Plaintiffs argue that they could not have brought this action until the plan was confirmed and the estate had returned to MTMS because it is a claim against the trustee's lawyers. An action against a bankruptcy trustee's lawyers for the trustee's administration of the bankruptcy estate is a claim which should have been litigated before the plan was confirmed. See El San Juan Hotel, 841 F2d at 481 (suit against trustee based on the administration of bankruptcy estate would be barred by confirmation plan).

The Plaintiffs also argue that the alleged cause of action against Allard & Fish could not have been brought prior to the entry of the confirmation order because they were not aware of the extent or depth of Bohl's conflict of interest until the jury returned a verdict in the Bohl litigation and therein set forth a specific dollar amount of damages.

A cause of action for legal malpractice, which essentially is the gravamen of Plaintiffs' Complaint, arises when one is aware of possible malpractice. See Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C., 449 N.W.2d 673, 675-76 (Mich App. 1989). It is not necessary that a plaintiff be notified of the full extent of the damages in order for his cause to accrue. Id. Therefore, this contention is without merit.

D.

As to the identity of causes of action, that determination is made by considering whether the claims arose out of the same transaction or series of transactions, or whether the claims arose out of the same core of operative facts. See Justice Oakes, II, 898 F2d at 1551-51.

In this case, the central issue of the bankruptcy proceedings was the determination and distribution of the MTMS estate and an attempt to reorganize MTMS. The essence of the complaint was that Allard & Fish did not take appropriate action with respect to an alleged conflict of interest and that a settlement was consummated in the Comerica claim which was more beneficial to Comerica than it would otherwise have been had the

conflict not existed. The Plaintiffs' claims against Allard Fish are based entirely on alleged acts and omissions that occurred within Allard & Fish's representation of Bohl in the bankruptcy proceedings. As a result, we find that the alleged claims against Allard & Fish are integrally related to the subject matter of the bankruptcy proceeding and arise out of the same transaction or series of transactions and the same core of operative facts as the bankruptcy proceedings.

III.

Notwithstanding that the confirmed plan would bar this litigation, the Plaintiffs contend that they reserved the right to sue Allard & Fish in the confirmed plan. The Plaintiffs rely on the following language in the confirmed plan of reorganization: "all causes of action which the debtor may choose to institute shall be vested with the debtor." J.A. at 297 (No. 91-2261). While this language allows MTMS to institute suits, any suit that it institutes would be subject to defenses such as lack of jurisdiction, the statute of limitations, or in this case, the doctrine of res judicata. For example, while MTMS may bring a suit against Allard & Fish, that suit can be dismissed on res

judicata grounds if that suit should have been brought in a prior action. As a result, the language that the Plaintiffs rely on is not helpful if their action is otherwise barred on res judicata grounds.

Along the same lines, the Plaintiffs argue that, pursuant to 11 U.S.C. § 1141(b) (1988), they could institute this cause of action against the Trustee's lawyers after the plan was confirmed. Section 1141(b) provides that: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." The Plaintiffs argue that a cause of action against a third party is a property or interest of the bankruptcy estate. They argue that upon confirmation of the plan on May 4, 1989, the cause of action against Allard & Fish accrued to MTMS.

This argument fails because it erroneously assumes that MTMS had preserved this lawsuit against Allard & Fish before the plan was confirmed. MTMS had not expressly reserved any such suit. Therefore, any cause of action that may have existed was extinguished upon the plan being confirmed and not appealed or modified to reserve a right to sue Allard & Fish. Therefore, this statute does not help the Plaintiffs in this case.

The Plaintiffs also argue that Allard & Fish should not be allowed to commit wrongful deeds in promulgating a plan for reorganization and then be shielded from those wrongful deeds by the confirmation of that plan. While this proposition might otherwise be appealing, the Plaintiffs knew about the wrongdoing prior to the confirmation of the plan in this case. Therefore, we find the Plaintiffs' public policy argument unpersuasive.

IV.

We find that the Plaintiffs' claims are barred by the doctrine of res judicata. Therefore, the district court's judgment is **AFFIRMED.**

APPENDIX C

BANKRUPTCY CODE 11

United States Code § 1127

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

United States Code § 1141

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in, the debtor, whether or not the claim or interest of such creditor, equity security holder or general partner is impaired under the plan and

whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming plan, the confirmation of a plan vests all of the property of the estate in the debtor.

United States Code § 1142

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

Federal Rules of Civil Procedure § 60

(b)(3) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:.....(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party;

Federal Rules of Civil Procedure § 12

(b)(6) Every defense, in law or fact; to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:.....(6) failure to state a claim upon which relief can be granted.....;

Federal Rules of Civil Procedure § 56

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party** A party against whom a claim counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any party thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in

controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits;** Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Amended effected March 19, 1948; July 1, 1963; August 1, 1987.]